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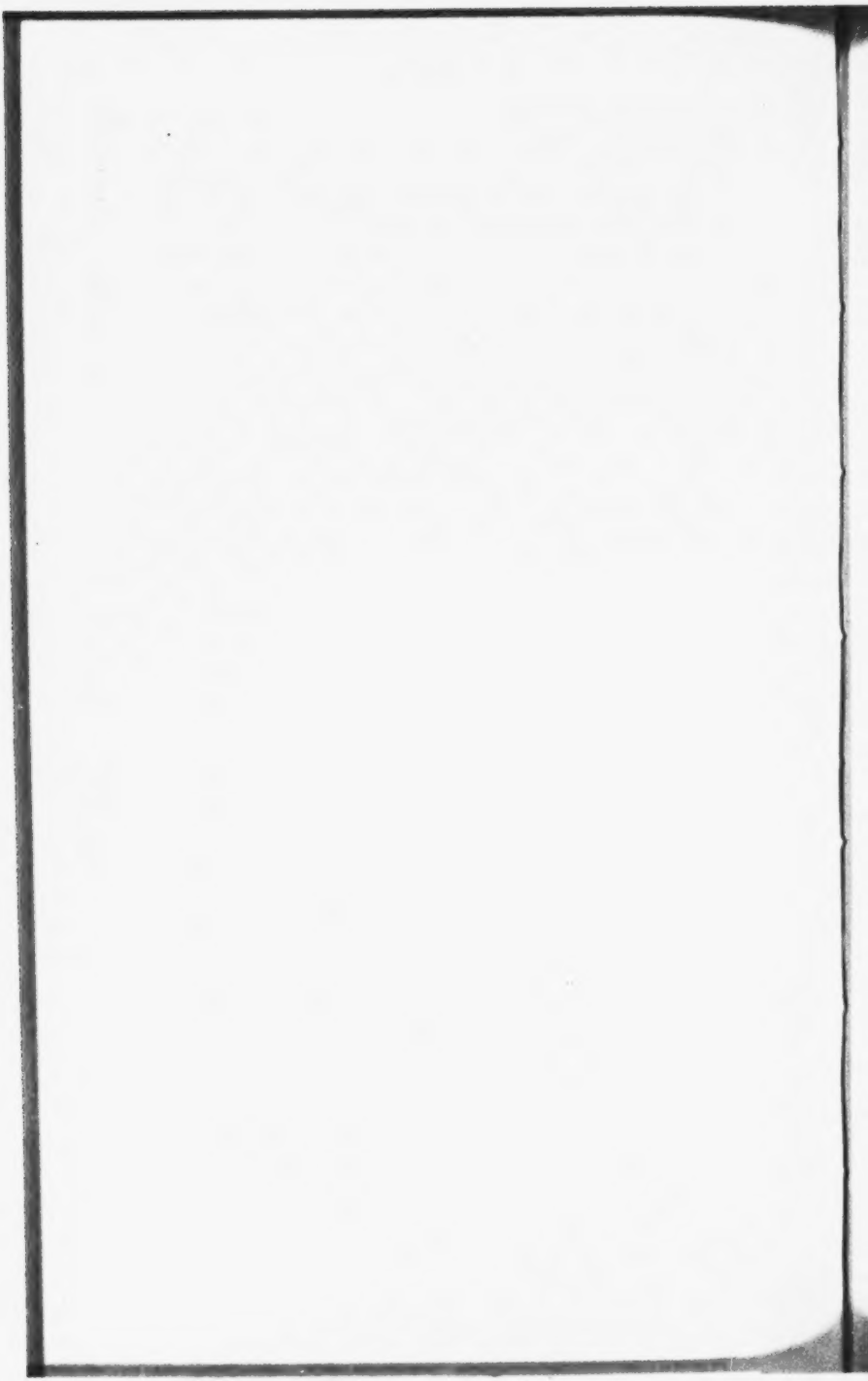
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 450

LEOPOLD W. MAHLER ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (R. 176a–183a, 205a–206a)[1] is reported at 196 F. Supp. 362. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 40–62) is reported at 306 F. 2d 713.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1962 (Pet. App. 63). A timely petition for rehearing was denied on July 20, 1962 (Pet. App.

[1] The record references are to the Joint Appendix in the court of appeals which has been filed with the Clerk of this Court.

64). The petition for a writ of certiorari was filed on September 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the legislation authorizing the Federal Aid Highway Program, by entrusting certain functions to the Bureau of Public Roads, created actionable duties on the part of the United States in favor of the users of State highways which were constructed in part with such funds.

2. Whether an action under the Tort Claims Act, predicated on alleged negligence by federal government officials in approving plans for the construction of State highway projects, is barred by the "discretionary function" exception of the Act, 28 U.S.C. 2680(a).

STATUTES INVOLVED

The pertinent statutes are set forth in the appendix, *infra*, pp. 15–19.

STATEMENT

Petitioners seek to recover damages under the Federal Tort Claims Act for personal injuries suffered by them when the car in which they were riding collided with a large boulder that had fallen from an embankment onto the Penn-Lincoln Parkway in Pittsburgh, Pennsylvania. This segment of the Penn-Lincoln Parkway project had been constructed by the Commonwealth of Pennsylvania with a 50 percent grant-in-aid from the federal government under the Federal Aid Highway Program.

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1. PETITIONERS' CLAIMS

Petitioners were driving on the Penn-Lincoln Parkway on September 21, 1958, when a large rock rolled in front of their automobile from the embankment on the side of the roadway. They subsequently brought this suit under the Tort Claims Act, 28 U.S.C. 1346(b), *infra*, pp. 18–19, to recover damages for their injuries, asserting that the United States had breached a duty owed to them under the Federal Aid Highway Program by negligently carrying out its statutory obligations under that program. Specifically, petitioners alleged that the Bureau was negligent (1) in approving the plans submitted to it by the Pennsylvania Department of Highways (R. 135a); (2) in failing to discover defects in construction by its inspections during construction (R. 136a); and (3) in failing to make adequate inspections after construction which would have revealed improper maintenance by the State (R. 136a).

2. THE FEDERAL AID HIGHWAY PROGRAM

Under the Federal Aid Highway Program, the federal government provides financial assistance to the States in their construction of highways.[2] This highway assistance is administered by the Bureau of Public Roads of the Department of Commerce.

[2] 23 U.S.C. 6, 104 (1952 ed.). Citations to Title 23 are to the 1952 edition (including Supp. V) of the United States Code, which includes the statutes in effect during the period when the negligent acts and omissions are alleged to have taken place. The legislation was recodified in part and superseded in part on August 27, 1958, 72 Stat. 885–921, although the purpose was not to change substantially the provisions. H. Rep. 1938, 85th Cong., 2d Sess.

When federal funds are appropriated by Congress for the highway program, the amounts are apportioned to the States according to a statutory formula.[3] In order to qualify for such a grant-in-aid, a State must first submit for approval by the Bureau of Public Roads its proposal for highway construction, furnishing also such detailed surveys, plans, specifications and estimates as may be required.[4] If the Bureau approves the State's proposal, as well as the relevant surveys, plans, specifications and estimates, it will then certify that fact to the Secretary of the Treasury, who is to set aside the proportional share payable by the United States on the project.[5]

In undertaking the project, the State awards the construction contracts and pays the contractor. The construction is carried out under the direct supervision of the State highway authorities, subject to inspection by the Bureau.[6] Reimbursement of the State for the federal share of the cost of construction is made after the Bureau is satisfied that construction has been accomplished in accordance with the approved plans.[7] Subsequent to the completion of construction, maintenance of the roads constructed with federal assistance is the responsibility of the State.[8] However, if the Secretary of Commerce finds that a road built with federal grant-in-aid is not being properly maintained, he is to give notice of the

[3] 23 U.S.C. 21, 21(a) (1952 ed.).
[4] 23 U.S.C. 12 (1952 ed.), *infra*, pp. 15–16.
[5] *Ibid.*
[6] 23 U.S.C. 13 (1952 ed.), *infra*, p. 16.
[7] 23 U.S.C. 14 (1952 ed.), *infra*, pp. 16–17.
[8] 23 U.S.C. 15, 48 (1952 ed.), *infra*, pp. 17–18.

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defect to the State. If proper maintenance is not accomplished within a specified time after such notice, future federal highway aid allocations to the State will be suspended until the road is repaired by the State.[9]

In 1943, the Bureau of Public Roads granted the Pennsylvania Department of Highways a federal aid grant of 50 percent of the cost of studies for the improvement of the Penn-Lincoln Parkway East, including the section concerned in this case (R. 199a). Subsequently, the Commonwealth submitted complete construction plans and estimates to the Bureau for review in order to qualify for the partial reimbursement (R. 200a–201a). After receiving the Bureau's approval, the Commonwealth undertook construction of the project. During the course of construction, the District Engineer's office made monthly inspections on behalf of the Bureau to determine whether construction was in accordance with the agreed upon plans (R. 15a, 25a, 118a). Construction was completed on June 28, 1957 (R. 187a). A final construction inspection was made by the District Engineer's office on July 10, 1957 (R. 186a). No maintenance inspections were made by the District Engineer's office between the date of completion of construction and the date of the accident, September 21, 1958 (R. 187a).

3. THE PROCEEDINGS BELOW

The government moved for summary judgment on grounds that (1) the government owed petitioners no

[9] *Ibid.*

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duty under the Federal Aid Highway Program, and (2) petitioners' suit was barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a), *infra*, p. 19 (R. 122a). The district court granted the government's motion on the first ground (R. 183a).

On petitioners' appeal, the court of appeals affirmed (Pet. App. 40–62). The court held that the inspection provisions of the highway legislation, on which petitioners rely, did not create a duty on the part of the United States running to petitioners, as Congress had designed the provisions solely as a means of protecting the federal investment in the highways. However, the court did find such a duty in 23 U.S.C. 8(a), *infra*, p. 15, which provides that only such highway specifications as are "conducive to safety" are to be approved by the Secretary. It reasoned that the approval provisions had as one of their purposes the promotion of road safety. Nonetheless, it concluded that this duty did not afford a basis for recovery because the claims of petitioners concerning the government's approval of the design and specifications of the highway were barred by the discretionary function exception to the Tort Claims Act, 28 U.S.C. 2680(a), *infra*, p. 19. The court pointed out that the government decisions involved were of a planning nature, requiring the making of policy judgments, and thus exempt (Pet. App. 61).

ARGUMENT

Review by this Court is not warranted. The two lower courts properly determined that petitioners

have no basis upon which to maintain a suit under the Tort Claims Act. In Pennsylvania (as in the other States) there can be no liability in tort "unless the defendant was guilty of a breach of some legal duty which he owed to the plaintiffs." *Zayc* v. *John Hancock Insurance Company,* 338 Pa. 426, 13 A. 2d 34, 36. As no legal duty was owed to petitioners by the Bureau of Public Roads, this suit must fail.

Even assuming that such a duty regarding the planning stages of the highway could be inferred, the court below properly ruled that petitioners' claim is barred by the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a).

1. In legislating with respect to roads, Congress acts under its constitutional authority (Art. I, Sec. 8) to regulate interstate commerce, to establish post roads and to provide for the national defense and general welfare. Nonetheless, as this Court has noted, in the exercise of this authority Congress generally has left with the States responsibility for the construction, maintenance and safety regulation of the highways.[10] *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U.S. 177, 187; *Morris* v. *Duby,* 274 U.S. 135, 143.

For its part, the Federal Aid Highway Program was not intended to supplant or supplement this primary responsibility of the States. As the statutory

[10] In Pennsylvania an action may not be maintained to recover damages sustained as a result of negligence of State officers in construction, repair and maintenance of State highways. *Collins* v. *Commissioner,* 262 Pa. 572, 106 A. 229. It is undoubtedly for this reason that the instant action has been commenced against the United States.

scheme, outlined *supra* pp. 3–6, makes evident, the State is the party responsible in the matters of initiating the highway projects, supervising their construction and maintaining them. The functions performed by the Bureau are designed to protect the government's interest in the efficient expenditure of its funds. Whatever benefits accrue to the road-using public as a consequence are merely incidental to this design. Project approval thus assures that federal funds are not being wasted on ill-conceived projects; approval of construction plans assures that federal funds are expended only on highways meeting generally accepted design criteria; withholding of reimbursement of the federal share of the cost of construction until the government is satisfied by inspection that construction has been in accord with the agreed upon plans assures that the plans are not nullified by construction which deviates from them; and withholding of future funds upon a finding of improper maintenance (uncorrected after notice) assures that further federal funds are not expended in a State which has signified an inability or unwillingness to maintain projects previously assisted with federal funds.

The relevant provisions of the federal aid highway legislation all derive from the original Federal Aid Highway Act of 1916, 39 Stat. 355. The history of the 1916 Act reflects that when Congress invested the Secretary of Agriculture (then the administrator of the program) with the discretion to approve construction plans, inspect during construction and withhold future highway funds upon a State's failure to main-

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tain properly, its concern was the protection of the government's interest in the expenditure of federal funds. There was no purpose or design to impose a legal duty upon the federal government—running to each user of the public roads—to insure the safety of highways constructed with federal aid.

Thus, in reporting H.R. 7167, which as amended became the Federal Aid Road Act of 1916, the House Committe on Roads noted that "[p]rimarily roads are local concerns and jurisdiction over them belongs to the States and local authorities." H. Rep. 26, 64th Cong., 1st Sess., p. 4. But, "[w]hile the States and local authorities ought not to be ousted from jurisdiction over the roads within their borders, yet Federal funds appropriated for roads must be rigidly safeguarded. It must be seen to that every dollar of this money expended secures a dollar's worth of road construction and road maintenance. To accomplish this, very large discretionary powers have, by this bill, been given to the Secretary of Agriculture." *Id.* pp. 4–5; see also S. Rep. 250, 64th Cong., 1st Sess., pp. 15–16, 21; 53 Cong. Rec. 1281, 1530, 6428–6429, 6783. This basic structure of the federal highway program has been reaffirmed by subsequent highway legislation. See, *e.g.*, S. Rep. 350, 84th Cong., 1st Sess., p. 8; S. Rep. 1965, 84th Cong., 2d Sess., p. 4; Levin, *Federal Aspects of the Interstate Highway Program*, 38 Neb. L. Rev. 377 (1959).

While the court of appeals agreed with the government that the inspection provisions of the legislation were not designed to impose a legal duty on the United States, it reasoned that a duty to road users

might be implied from its planning approval provisions (Pet. App. 59).[11] This reasoning was based entirely on the fact that Section 12 of the Federal Aid Highway Act of 1938, 23 U.S.C. 8a (1952 ed.), *infra*, p. 15, "made safety a consideration in federal approval of a federal-aid highway project" (Pet. App. 59). We submit that this introduction of the "safety" factor in 1938 (along with other factors) did not alter the nature of the aid legislation. Indeed, it is unequivocally clear from the legislative history that the purpose of Section 12 was to "place the responsibility upon the Secretary of Agriculture and the Bureau of Public Roads of getting the best roads built with these funds for the dollar expended." 83 Cong. Rec. 6384. Again, the intent of Congress was to prevent wastage of the federal funds. While the road user was benefitted as an incident of the legislation, no legal relationship was created between him and the government.[12]

Directly in point in the instant case is this Court's recent decision in *United States* v. *Neustadt*, 366 U.S. 696, in which it was held that the United States could

[11] Even then, the court did not reach the question of whether such a duty would be actionable under Pennsylvania law (Pet. App. 59). It held that the claim was not actionable, in any event, by virtue of the discretionary function exception at 28 U.S.C. 2680(a) (see *infra*, pp. 12–14).

[12] For the same reasons, petitioners' frequent assertions that, under statutory and regulatory directives, road inspection as to construction and maintenance must take into account the "safety" factor (Pet. 16–20, 22–23) are beside the point. The determinative consideration is that, within the context of this aid legislation, the safety factor has been incorporated only because Congress has sought to insure that the states will utilize their federal grants wisely and appropriately.

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not be held liable under the Tort Claims Act to a purchaser of residential property who had relied to his detriment on an inaccurate FHA appraisal and inspection of the property. The Court pointed out that, while FHA appraisals inured incidentally to the benefit of prospective purchasers, the "primary and predominant objective of the appraisal system was the protection of the Government and its insurance funds" (366 U.S. at 709). Accordingly, no actionable duty had been created on behalf of the purchaser.[12]

Contrary to petitioners' contention (Pet. 13–16), the decision below does not conflict with any of the decisions of this Court or of the other circuits. In each case cited by petitioners, the government had undertaken direct operational responsibility with respect to the activity involved. Thus, in *Indian Towing Co.* v. *United States,* 350 U.S. 61, the government was held liable for the negligent operation of a lighthouse; in *Rayonier, Inc.* v. *United States,* 352 U.S. 315, it was held liable because officials of the Forest Service had allowed inflammable materials to accumulate on

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[12] Petitioners seek to distinguish the *Neustadt* case by asserting that, in that case, no problem involving state law was presented (Pet. 17, 20–21). But, by definition, all Tort Claims Act suits are predicated on state law as well as on the Act, and the *Neustadt* claim was thus necessarily predicated on the law of Virginia. Petitioners fail to recognize that here, as in *Neustadt*, the *duty*, if one existed, was imposed by federal law and not state law.

Pennsylvania law, it may be noted, gives petitioners no comfort. *Bollin* v. *Elevator Construction & Repair Co.*, 361 Pa. 7, 63 A. 2d 19, upon which they have primarily relied (Pet. 24, fn. 23), is easily distinguishable because it involved a statute which directed the inspection of elevators solely for the purpose of insuring the safety of the elevator-using public.

government land, and had failed properly to suppress a fire on the land; similarly, in *Fair* v. *United States,* 234 F. 2d 288 (C.A. 5), the government operated a hospital. In the two wreck cases cited by petitioners (*Somerset Seafood Co.* v. *United States,* 193 F. 2d 631 (C.A. 4) and *Cornell Steamboat Co.* v. *United States,* 138 F. Supp. 16 (S.D.N.Y.), affirmed 247 F. 2d 275 (C.A. 2)), the government had been required to mark and remove the wrecks under the Wreck Act, 33 U.S.C. 409, 414.[14] In contrast, here the United States has no operational responsibilities whatsoever and exercises functions which are related only to the protection of its financial interest in the activity.

2. Even assuming *arguendo* that, by reason of Section 12 of the 1938 enactment, the government had an obligation to road users to approve only such highway construction plans as were conducive to safety, the court below was correct in holding that the United States could not be made liable for a breach thereof because of the "discretionary function" exception to the Tort Claims Act, 28 U.S.C. 2680(a), *infra,* p. 19. As this Court held in *Dalehite* v. *United States,* 346 U.S. 15, the "discretionary func-

[14] Equally remote from the present case is the situation presented in *Munis* v. *United States*, 305 F. 2d 285 (C.A. 2) and *Winston* v. *United States*, 305 F. 2d 253 (C.A. 2), pending on petition for a writ of certiorari, No. 464, Oct. Term 1962. Those cases involve the question of the applicability of the Tort Claims Act to claims by federal prisoners for damages for personal injuries sustained during confinement, due to the alleged negligence of federal prison personnel.

tion or duty" which "cannot form a basis for suit" includes not only the initiation of programs and activities, but also "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" (346 U.S. at 35–36). Thus, *Dalehite*, and the subsequent decisions applying its doctrine,[15] have made it plain that 28 U.S.C. 2680(a) exempts the United States from liability with respect to decision-making "at a planning rather than operational level" (346 U.S. at 42).

The functions of the Secretary of Commerce, in appraising and approving the designs, plans and specifications for proposed state highway projects, are obviously "planning" functions, as contemplated by *Dalehite*. The questions as to whether particular highway projects are feasible practically and financially, and meet the standards of the federal program, can be resolved only through the exercise of policy judgment and discretion.[16] Accordingly, such planning functions fall squarely within the area of the exempted "discretionary function." *United States* v. *Gregory*, 300 F. 2d 11 (C.A. 10); *Coates* v. *United*

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[15] See *Eastern Airlines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62, 76–77 (C.A.D.C.), affirmed *per curiam* sub nom. *United States* v. *Union Trust Co.*, 350 U.S. 907; *Dahlstrom* v. *United States*, 228 F. 2d 819 (C.A. 8); *United States* v. *Ure*, 225 F. 2d 709 (C.A. 9); *United States* v. *Gregory*, 300 F. 2d 11 (C.A. 10).

[16] Similar policy judgment was not involved in *American Exchange Bank of Madison, Wis.* v. *United States*, 257 F. 2d 938 (C.A. 7), *United States* v. *Pierce*, 235 F. 2d 466 (C.A. 6), or any of the other cases upon which petitioners rely.

States, 181 F. 2d 816 (C.A. 8); *United States* v. *Ure,* 225 F. 2d 709 (C.A. 9).[17]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1962.

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[17] Nor is there merit in petitioners' contention (Pet. 27) that the discretionary function exception could not be applied in the absence of a trial. As the functions of the government officials were set out by statute, there was no need for a hearing to develop their discretionary nature.

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APPENDIX

The relevant provisions of the Federal Highway Act of 1916 (39 Stat. 355) as amended by the 1921 Act (42 Stat. 212) and others are as follows:

23 U.S.C. 8a (1952 ed.) provides:

> § 8a. APPROVAL OF METHODS OF BIDDING, PLANS AND SPECIFICATIONS.
>
> The Secretary of Commerce shall approve only such methods of bidding and such plans and specifications of highway construction for the type or types proposed as will be effective in securing competition and conducive to safety, durability, and economy of maintenance.
>
> * * * * *

23 U.S.C. 12 (1952 ed.) in pertinent part provides:

> § 12. SUBMISSION OF PROJECT STATEMENTS; APPROVAL; SETTING ASIDE SHARE OF FEDERAL AID.
>
> Any State having complied with the provisions of this chapter, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Commerce project statements setting forth proposed construction or reconstruction of any primary or interstate or secondary or intercounty highway therein. If the Secretary of Commerce approves the project, the State Highway Department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require; items included for engineering, inspection, and unforeseen contingencies shall not exceed 10 per centum of the total estimated cost of its construction.
>
> When the Secretary of Commerce approves such surveys, plans, specifications, and esti-

mates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this chapter on account of such projects, which shall not exceed 50 per centum of the total estimated cost thereof * * *.

* * * * *

23 U.S.C. 13 (1952 ed.) in pertinent part provides:

§ 13. CONSTRUCTION AND RECONSTRUCTION WORK; HOW CONDUCTED.

The construction and reconstruction of the highways or parts of highways under the provisions of this chapter, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Commerce. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Commerce and in accordance with the rules and regulations pursuant to this chapter.

* * * * *

23 U.S.C. 14 (1952 ed.) in pertinent part provides:

§ 14. PAYMENT TO STATES OF FEDERAL AID; TIME AND MANNER OF MAKING.

When the Secretary of Commerce shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project.

The Secretary of Commerce may, in his discretion, from time to time, make payments on such construction or reconstruction as the work progresses, but these payments, including pre-

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vious payments, if any, shall not be more than the United States pro rata part of the value of the labor and materials which have been actually put into such construction or reconstruction in conformity to said plans and specifications. The Secretary of Commerce and the State highway department of each State may jointly determine at what time and in what amounts payments as work progresses shall be made under this chapter.

* * * * *

23 U.S.C. 15 (1952 ed.) in pertinent part provides:

§ 15. FAILURE OF STATE TO MAINTAIN FEDERAL-AID ROAD; DUTY OF COMMISSIONER.

It shall be the duty of the State to maintain any highway within its boundaries after construction under the provisions of this chapter. If at any time the Commissioner of the Bureau of Public Roads shall find that any such highway in any State is not being properly maintained he shall call such fact to the attention of the highway department of such State and if within ninety days after receipt of such notice said highway has not been put in a proper condition of maintenance then the Commissioner of Public Roads shall withhold approval of further projects in such State until such highway has been restored to a proper condition of maintenance: *Provided,* That in any State wherein the highway department is without legal authority to maintain a highway so constructed as a secondary or an urban road project the highway department of such State shall enter into a formal agreement with the appropriate officials of the county or city in which such highway is located for its maintenance, and if at any time the Commissioner of Public Roads shall find that such highway is not being properly maintained he shall call such fact to the attention of the highway department of such State and if within ninety days after re-

ceipt of such notice said highway has not been put in proper condition of maintenance then the Commissioner of Public Roads shall withhold approval of further secondary or urban road projects in such county or city until said highway shall have been placed in a proper condition of maintenance.

* * * * *

23 U.S.C. 48 (1952 ed.) in pertinent part provides:

§ 48. MAINTENANCE OF ROADS CONSTRUCTED.

To maintain the roads constructed under the provisions of this title shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Commerce shall find that any road in any State constructed under the provisions of this title is not being properly maintained, he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not yet been put in a proper condition of maintenance, then the Secretary of Commerce shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road until it has been put in a condition of proper maintenance.

* * * * *

The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b) provides:

§ 1346. UNITED STATES AS DEFENDANT.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive ju-

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risdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674 in pertinent part provides:

§ 2674. LIABILITY OF UNITED STATES.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

28 U.S.C. 2680 in pertinent part provides:

§ 2680. EXCEPTIONS.

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

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